79-187

Supreme Court, U. S.
FILED
AUG 4 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

PAUL MARCY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ALLAN A. ACKERMAN
100 N. LaSalle Street
Suite 611
Chicago, Illinois 60602
(312) 332-2863
Attorney for Petitioner

RAYMOND J. SMITH
53 W. Jackson Boulevard
Suite 615
Chicago, Illinois 60604
(312) 922-8980
Of Counsel

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Paul Marcy, petitions for Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The order of the Court of Appeals affirming the conviction is not reported; the order is reproduced as Appendix A, *infra.*

JURISDICTION

The order of the Court of Appeals for the Seventh Circuit affirming the conviction and sentence was entered on July 9, 1979. This petition is filed within thirty (30) days of that date. The jurisdiction of the United States Supreme Court is conferred by 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the government may, contrary to *Holland* v. *U.S.*, 348 U.S. 121 (1955), offer a cash expenditure method of proof in a criminal I.R.S. case without offering any evidence as to an opening year balance or opening net worth . . . particularly where the government admits to making no investigation for pre-indictment years?

1(a). Whether certiorari is appropriate to resolve the split in Circuits on the question of whether the government must offer opening net worth evidence and proof in a criminal tax prosecution where the government relies, at least in part, on the "cash expenditure" method of proof? (The First, Second and Fifth Circuits hold . . . yes, the Seventh Circuit . . . holds no.)

2. Whether consistent with the Fifth Amendment Due Process Clause and this Court's decision in *Fitzpatrick* v. *U.S.*, 178 U.S. 305 (1900), may evidence [new and original] based only on an impermissibly expanded cross-examination be used by the trial court on the question of innocence or guilt? Does not the Court's decision in *Fitzpatrick* directly conflict with Rule 611, Fed.R.Evid. (1977)?

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fifth Amendment of the United States Constitution provides in pertinent part:

> "... nor be deprived of life, liberty or property without due process of law".

26 U.S.C. §7206(1) states:

> § 7206. *Fraud and false statements*
>
> Any person who—
>
> *(1) Declaration under penalties of perjury.*— Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

Federal Rules of Evidence, Rule 611, in part, reads as follows:

> Rule 611.
>
> Mode And Order Of Interrogation And Presentation
>
> *(a) Control by court.* The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
>
> *(b) Scope of cross-examination.* Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

STATEMENT OF FACTS

(A)

Procedural History

On April 14, 1977, the Special February 1977 Grand Jury returned indictment number 77 CR 361 against Defendant, Paul Marcy. (Marcy) The one count indictment charged Marcy with a violation of Title 26, United States Code, Section 7206(1) in that his income tax return[1] for calendar year 1970 was not true and correct as to every material matter. Specifically, Marcy failed to report a $55,000 payoff which he received in 1970.

After reassignment of the case from Judge Decker to Judge Roszkowski, Defendant waived trial by jury (O.R. 37).[2] The case proceeded to trial on October 3, 1978 before Judge Roszkowski and concluded on October 11, 1978. On October 27, 1978, the court entered its finding and judgment of guilty (O.R. 47) and on November 16, 1978 filed its Memorandum (Findings of Fact) pursuant to Rule 23(c) Fed.R.Cr.P. (O.R. 51).

Marcy duly filed motions for a Finding of Not Guilty or New Trial with supporting memoranda. (O.R. 52; 53) After considering the government's response (O.R. 55; 56) and Marcy's reply (O.R. 57), the court sentenced Marcy to one year imprisonment and specifically recommended that he be furloughed every 90 days for medical treatment. (O.R. 58)

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1 That return was also signed by Ann Marcy, defendant's wife.

2 "O.R." represents the original record on appeal. "Tr." represents the transcript of proceedings before the District Court.

(B)

The Trial

What this case is all about may be gathered from a single passage of the trial transcript. During the government's cross examination of Marcy's wife [testifying as a defense witness] the following appears:

> "Q. Now, you testified that the 1969 was a split deposit: part went to your checking account, part went into the *cash horde?*
> A. Horde?
> MR. SMITH: Horde?
> THE WITNESS: That is a nice name." (Tr. 562)

On October 3, 1978, the government offered the testimony of William Adams, a 72 year old immunized witness (Tr. 5-7) Adams testified that in 1969 he was contacted by certain persons in connection with their seeking some favorable zoning in Cook County, Illinois (Tr. 10-15).[3] Apparently there was a 66 acre tract of land near Palatine, Illinois, and the Sellergrens wanted to convert this property into a multi-million dollar building project (Tr. 67-68). Adams went about the business of attempting to assist the Sellergrens in getting favorable zoning. The Cook County Zoning Board of Appeals had an executive secretary, Marcy. Adams claimed he went to Marcy in September and October, 1969 in connection with seeking the favorable zoning (Tr. 18-24). In October, 1969, Adams told the Sellergrens he would need about $70,000 in cash in connection with the zoning (Tr. 36-38).[4] In January, 1970 the Zoning Board approved the zoning change and Adams testified that on January 27, 1970, he gave Marcy $55,000 . . .

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3 The Sellergren family, Chicago-based builders, contacted Adams because of zoning problems in 1969 (Tr. 67-68).

4 Adams never mentioned Marcy to the Sellergrens.

thus keeping $15,000 for himself (Tr. 40). Adams, as an immunized witness, testified that he did not report the monies he kept on Federal Income Tax returns (Tr. 91).[5]

James Sellergren testified as an immunized government witness (Tr. 169-74). Sellergren testified, in substance, that Adams was a plumbing contractor who was told that if he succeeded in getting the zoning he could or would get the plumbing contract for the multi-million dollar building contract (Tr. 184-85). During the summer of 1974 Sellergren was interviewed by the I.R.S. and he denied any payments (Tr. 219). Thereafter he met with Adams and at that time Adams told Sellergren . . . that he had paid $55,000 [not $70,000] and that was the first that Marcy's name came up (Tr. 202-213).

The government's *expert witness* TESTIFIED THAT HE CALCULATED ONLY FOR THE YEARS 1970-73 (Tr. 322). The expert testified that he added the $55,000 [alleged bribe] to the 1970 return and thus figured the understated tax liability (Tr. 327).[6] The same expert testified THAT HE GAVE NO CREDIT TOWARD THE TAX DEFICIENCY FOR MONIES ACCUMULATED PRIOR TO 1970 (Tr. 376-77).[7] The government's expert, on cross examination, admitted:

"Q. All right, sir. Directing your attention to Chart 1—

A. I have it.

5 The multiple matters for which Adams had been immunized are set out at Tr. 5-8; 92-97).

6 At this point the government seemingly attempts to utilize two (2) theories . . . specific items . . . and cash expenditures (Tr. 322-28).

7 The government was aware, pretrial, that prior accumulated monies were Marcy's defense (cf., Tr. 420, 825-30).

Q. *—you did not give credit as far as cash available to anything before 1970, is that correct?*

A. *That is correct.*

Q. So even if a check were given in cash—and cashed two days before 1970 began, you would not give him credit for that, is that correct?

A. That is correct." (Tr. 383). (Emphasis ours)

Examples of monies available prior to 1970 . . . for which no credit were given the taxpayer included two (2) separate checks . . . one for $8,322.00 (Tr. 384) and another for $4,678.24 (Tr. 420).[8] The government's case-in-chief stopped with absolutely no effort by the government to ascertain the availability of pre-existing monies [pre-1970]. The thrust of the government's evidence was that Marcy spent some $65,000 in cash after 1970 [albeit the alleged bribe was but $55,000].

Ann Marcy, the wife of defendant for 39 years, testified that for several years in the late 1950's her father gave her $400 a month cash prior to his demise (Tr. 472-75). All told, Mrs. Marcy testified that up to and including 1957 she would have received in excess of $35,000 in cash from her father (Tr. 472-76). Without rebut, she testified that her father owns several parcels of real estate and was a local businessman (Tr. 471-76).[9] Mrs. Marcy also testified that when her father-in-law, Genaro Marciano, passed away in 1965 she and her husband [petitioner herein] received about $10,000 . . . her father-in-law passing away in 1965 (Tr. 483-87). *It is appropriate to note at this point that using the government's figures Marcy earned $199,644 . . . from 1955-1973* (Tr. 848). Additionally, Mrs. Marcy tes-

8 Unrebutted defense testimony showed that these checks were converted to cash and deposited in Marcy's cash hoard (Tr. 488-89).

9 Ann Marcy's maiden name was Geraci.

tified that when a daughter passed away the family received about $5,000 in cash from funeral gifts (Tr. 485-86). Further, the funeral monies as well as the other monies received either in cash . . . or converted into cash . . . were put in a steel box in the home shared by the taxpayer, his wife and family (Tr. 481-86). The government, on cross-examination, inquires as follows:

> "Q. Did anyone else know about the box besides you and your husband?
>
> A. I don't know.
>
> Q. Do you believe anyone else knew about the box other than your husband?
>
> A. Why should I tell anybody? Would you say something to someone? I have a box, you know, hidden in the house? I mean, that, to me, would be kind of dumb" (Tr. 549).

Mrs. Marcy further testified that she neither counted nor kept an inventory of the monies that were in the steel box at home (Tr. 583-84). The government points out that in 1965 there was a car that was financed and in 1968 there was either an auto or home improvement loan (Tr. 605-610). Mrs. Marcy does not really remember what was spent from the box (Tr. 625, 626). Mrs. Marcy further testified that she doesn't know anything about the big things, her husband took care of those (Tr. 630-31, 661). The sum of her testimony may be reduced to the following:

> "A. Like I said before, the only thing I took care of was my little checking account that I usually take care of. I had no idea about anything else. I don't know the cost of anything.
>
> Q. So any cash spent on furs from '70 to '73 came from the steel box?
>
> A. Whatever. I suppose. He and I—he could do whatever he wanted and I could do whatever I wanted.
>
> Q. In 1970 to '73 where did your husband buy his clothes?

> A. Oh, my gosh! I don't know" (Tr. 668).

Paul Marcy, petitioner, testified that he received no monies from Adams in either 1969 or 1970 (Tr. 737-39).[10] The government's cross examination, over objection, goes for about 90 pages. Over objection, Marcy now testified to all manner of activities not the least of which relate to how much money he took in and pulled out of the steel box from his home (Tr. 761-63; 765; 774; 778-780). Marcy testified that the source of the monies spent from 1970 to 1973 were accumulated in prior years (Tr. 816-18). Based upon the expanded [in petitioner's view, impermissible] cross-examination the actual steel box is now introduced as an Exhibit and about $5,000.00 taken from same are reviewed by the trial court and returned to the taxpayer (Tr. 816-23; 867-72).[11] Defense evidence, received by stipulation, further indicates that over $6,000.00 were received in additional funeral monies (Tr. 825-30).

In rebuttal, the government offers their tax expert who, on cross examination, testified as follows:

> "Q. You mentioned, assuming all my hypothetical questions, that the figure $114,000 in expenditures —you come up with a figure as far as the difference between the total expenditures less cash available, independent of my figure, of a difference of $46,628.21, is that correct?

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[10] Marcy's total direct testimony is reproduced as Group Appendix B, *infra*.

[11] To clarify! The cross examination entered into the arena of new and additional evidence. ***This new evidence*** included the actual presentation to the trial court, on the court's request, of both the steel box and ***the monies*** it contained during this trial (Tr. 792-795).

A. Yes, but—

Q. Okay, that is what figure you came up with. But you would add to it whatever it cost for a trip to Hawaii, whatever it cost for the carpet, whatever it cost for the chandelier, is that right?

A. Among other things.

Q. And according to my hypothetical again you would have had at least $59,000 available on January of 1970 to make up that $46,628 plus those other expenses, is that correct, assuming my facts that he really received that money?

A. That is correct" (Tr. 862).

REASONS FOR GRANTING THE WRIT

1. Whether the government may, contrary to *Holland* v. *U.S.*, 348 U.S. 121 (1955), offer a cash expenditure method of proof in a criminal I.R.S. case without offering any evidence as to an opening year balance or opening net worth . . . particularly where the government admits to making no investigation for pre-indictment years?

1(a). Whether certiorari is appropriate to resolve the split in Circuits on the question of whether the government must offer opening net worth evidence and proof in a criminal tax prosecution where the government relies, at least in part, on the "cash expenditure" method of proof? (The First, Second and Fifth Circuits hold . . . yes, the Seventh Circuit . . . holds no.)

In *Holland* v. *U.S.*, 348 U.S. 121 (1955), the Court granted certiorari because:

> "In recent years, however, tax-evasion convictions obtained under the net worth theory have come here with increasing frequency and left impressions beyond those of the previously unrelated petitions. We concluded that the method involved something more than the ordinary use of circumstantial evidence in the usual criminal case. *Its bearing, therefore, on the safeguards traditionally provided in the administration of criminal justice called for a consideration of the entire theory.* At our last Term a number of cases arising from the Courts of Appeals brought to our attention the serious doubts of those courts regarding the *implications of the net worth method.* Accordingly, we granted certiorari in these four cases and have held others to await their decision." (348 U.S. at 124-125) (Emphasis ours)

In *Holland* and its companion cases (*Smith, Friedberg* and *Calderon*) the Court affirmed I.R.S. convictions while fully reviewing the "net-worth" syndrome. Seemingly the Court approved the net worth prosecutions with the caveat that the government completely follow-up and investigate leads and provide an opening net worth . . . upon which to premise the tax violation for the particular year for which the taxpayer has been prosecuted.[12]

In *U.S.* v. *Meriwether*, 440 F.2d 753 (C.A. 5, 1971), the Court set aside I.R.S. convictions for the years 1962-1964 on the grounds, *inter alia*, that the trial court declined to fully determine the impact of the statute of limitations on that prosecution. As may be pertinent to the petition

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[12] *Holland* at 129, 132-34. In *Spies* v. *U.S.*, the Court granted certiorari because of the similar important question of federal law not previously passed on by the Court (317 U.S. at 493 (1943). Both *Spies* and *Holland* considered prosecution under the Internal Revenue Code. *Holland* considered the problems of proof . . . whereas *Spies* considered felony vs. misdemeanor prosecutions.

at bar a reading of *Meriwether* finds that the government offered two (2) theories . . . "specific items method" and "comparative net worth method" (*id.* at 755). In *Meriwether* the Court offered, as to Mrs. Meriwether, the following:

> "Under its "net worth theory", however, the government failed to establish with reasonable certainty a definite opening net worth of the joint income of *Meriwether* and his wife. INDEED, IT CAME NEAR IGNORING MRS. MERIWETHER. IT DID INTRODUCE HER ALABAMA INCOME TAX RETURNS FOR THE YEARS 1955-1963, BUT OTHERWISE MADE NO ATTEMPT TO ASCERTAIN HER NET WORTH" (440 F.2d at 755; emphasis supplied).
>
> • • • • •
>
> "On the net worth method the proof was insufficient as to the net worth as to Mrs. Meriwether" (440 F. 2d at 757).

In *U.S.* v. *Hallman*, 594 F.2d 198 (C.A. 9, 1979), the Court affirmed a conviction under 26 U.S.C. §7201. As may be pertinent to our inquiry we note that the primary issue offered was that the government failed to consider and investigate the opening net worth of *Hallman's* wife (594 F.2d at 200). The Court, while seemingly rejecting the proffer offered the following:

> "In contending that the Government's determination of opening net worth is defective because it failed to take into account the net worth of his wife, appellant relies upon *United States* v. *Meriwether*, 440 F.2d 753 (5th Cir. 1971). That case holds that the Government must, in establishing its net worth theory, show with reasonable certainty a definite opening net worth of the joint income of the taxpayer and his spouse. The Government contends, correctly we believe, that it had no obligation to prove the spousal net worth because

> of *the absence of any evidence that Mrs. Hallman had significant earnings, and because a stipulation of fact entered into between the parties expressly provided that appellant receive no gifts, loans, inheritances or any other kind of non-taxable receipts during the calendar years 1969, 1970 and 1971. In addition, appellant furnished no "leads" to the Government explanatory of the source of any assets possessed by him.*" (594 F. 2d at 200) (Emphasis ours)

The *Hallman* Court went further. That Court, while rejecting the invitation to reverse on the specific and narrow ground that the government offered no evidence of "spousal net worth" did offer the following:

> "Thus, the trend of decision in this Circuit supports the conclusion that proof of *spousal net worth* is not a part of the government's *prima facie* case, but rather falls under its obligation to negate explanations and leads." (594 F.2d at 200) (Emphasis ours)
>
> • • • • •
>
> "In short, we feel that evidence of the receipt of no funds from non-taxable sources as reflected in the stipulation of facts, no evidence of substantial earnings on the part of the spouse, and no leads do not require the Government, in the words of *Talik*, '[to] hypothesiz[e] them (spousal assets) out of nothing.' " (594 F.2d at 200)

It is fairly clear that the Ninth Circuit (*Hallman*) has joined the Fifth Circuit (*Meriwether*) in compelling a clear and distinct obligation on the government to, at the very least, "investigate" spousal net worth. The Court of Appeals for the Seventh Circuit makes absolutely no such distinction and offers absolutely no necessity for any action by the government relating to spousal net worth. In the case at bar, Mrs. Marcy presented unrebutted evidence that she received over $34,000.00 in pre-tax years

. . . in cash (Tr. 471-477). In juxtaposition the government's entire investigation of this taxpayer spanned only the years 1970-1973. The government would have us believe that for the peculiar purposes of the case at bar neither the taxpayer nor his spouse nor his family existed prior to 1970. Indeed, in an almost shocking fashion the government agents testified . . . they did no investigation for the years prior to 1970 (Tr. 322; 376-378).[13] The government takes solace from the fact that their theory of prosecution was a "joinder" as between a single *"specific item"*[14] *and the cash expenditure theory.* The government maintains that under a specific item prosecution they need not prove any opening net worth . . . or indeed anything else. Just the simple "specific item". The government refuses to acknowledge that in *Meriwether* the prosecution was on a theory of specific item(s) and net worth . . . and one of the predicates of reversal of that conviction was the failure of the government to provide any *opening spousal net worth* as to Mrs. Meriwether (440 F.

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[13] The government's investigation can hardly square with the investigation in *Holland* where the taxpayer was charged with evading taxes for the years 1946-48. The government's investigation went back to 1913 (348 U.S. at 130-35). In *Friedberg* v. *U.S.*, 348 U.S. 142 (1954), the taxpayer was charged with evading taxes from 1944-47. The government's investigation seemingly went back to 1924 (348 U.S. at 144-45). In *U.S.* v. *Calderon*, 348 U.S. 160 (1954), the court's decision shows that the government's investigation went back to 1935, while the indictments charged evasion for the years 1946-49 (348 U.S. at 164-66). Finally, in *Smith* v. *U.S.*, 348 U.S. 147 (1954), the taxpayer's convictions were for the years 1946-50, but the government's investigation ran at least as far back as 1936 (348 U.S. at 157).

[14] The multi-immunized government witness, William Adams, said that in January, 1970, he gave the taxpayer $55,000 (Tr. 39-41). The indictment was returned on April 14, 1977 . . . one day prior to the expiration of the statute of limitations (cf., *Jaben* v. *U.S.*, 381 U.S. 214 (1965)).

2d at 755, 757). Where the government utilizes the cash expenditure theory it is clear . . . that the government must offer evidence of an opening net worth. In *Dupree* v. *U.S.*, 218 F.2d 781 (C.A. 5, 1955), the government employed the expenditures method of proof to show that *Dupree* willfully understated his income. While reversing that conviction the Court stated:

> "The trial court below properly charged that each prosecution year must stand alone, and that the Government must *prove opening available funds* for each year; for, obviously in a prosecution for the year 1946, there would be a complete failure of proof unless the excess expenditures shown were shown to have come from income received during 1946 *instead of being expenditures in 1946 of accumulations from prior years, or even of unreported income for 1945 or prior years.* 218 F.2d at 785. Thus, where the Government employs *the expenditures method of proof, it must prove that yearly expenditures exceeded reported income and it must establish, either directly or inferentially, that the expenditures were made from taxable income. Where both requirements are not met, a conviction cannot stand.*"[15] (Emphasis ours)

In *Marcus* v. *U.S.*, 422 F.2d 752 (C.A. 5, 1970), the Court set aside convictions for Internal Revenue violations where the thrust of the appeal was that in an expenditure prosecution the government offered or established no opening net worth of either the taxpayer or Mrs. Marcus. While reversing the conviction and as specifically related to this case the Court stated:

> "The defense objected to the admission of this evidence on the ground that *no foundation had been laid by the Government to show that such expenditures*

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[15] *Dupree* was quoted with approval in *U.S.* v. *Marshall*, 557 F.2d at 529 (C.A. 5, 1977).

were not made from prior accumulations, loans, gifts or the separate estate of Mrs. Marcus by establishing an opening net worth as of January 1, 1959, and, consequently, the evidence was not relevant on the issue of wilfulness.

It was apparently the Government's hope that the jury would infer from the fact that Marcus spent in excess of $600.00 in each of the prosecution years that he had to be aware that he had a gross income in excess of $600.00. But this inference cannot logically follow unless, from the fact that these expenditures were made, it is shown that they *were made out of taxable income, and not from prior accumulations, gifts, etc.* The Government failed to lay any foundation to indicate that the expenditures came out of current income, and, for this reason, the jury could not infer that Marcus had a gross income in excess of $600.00 out of which the expenditures had been made, and further, that, by making the expenditures, he had to know that he had a gross income in excess of $600.-00. As was said in *Dupree* v. *United States,* 5 Cir., 1955, 218 F.2d 781, 784: 'If there is no established figure showing the source from which the expenditures during the year can be made, or the complete lack of such source, then there is no relevance to proof of expenditures during the year, no matter how large they may be.' See *Blumberg* v. *United States,* 5 Cir., 1955, 222 F.2d 496, 499-500; *Bryan* v. *United States,* 5 Cir., 1949, 175 F.2d 223." (422 F.2d at 755) (Emphasis ours)

In *U.S.* v. *Slutsky,* 487 F.2d 832 (C.A. 2, 1973), the Court reviewed, at length, an I.R.S. conviction where the methods of proof offered by the government spanned from the bank deposit theory to net worth. While affirming that conviction the Court, *inter alia,* stated:

> "If the taxpayer's deposits or other expenditures during the relevant year 'came from a safety deposit box in a bank or from a hoard at home, obviously they *are not "income" when taken from their storage place and deposited in a checking account nor when spent'."* (487 F.2d at 842) (Emphasis ours)

Slutsky, is likewise informative in that the Court discusses the "leads" doctrine [another avenue of investigation totally overlooked by the government in the case at bar]. In *Slutsky,* the Court points out:

> "At one time there was some doubt as to the applicability of the "leads" doctrine to a bank deposits case. In *United States* v. *Procario,* 356 F.2d 614, 617 (2 Cir.), cert. denied, 384 U.S. 1002 (1966), for example, we noted the argument but found no need to resolve it upon the facts of that case. The contention that the "leads" doctrine should be confined to a net worth case is no longer tenable. See, e.g., *United States* v. *Ramsdell,* 450 F.2d 130, 133 (10 Cir., 1971); *United States* v. *Stein,* 437 F.2d 775, 778 (7 Cir.), cert. denied, 403 U.S. 905 (1971)." (487 F.2d at 843, n. 14).

The necessity [*under an expenditures theory*] of providing an opening net worth can hardly be disputed. In *U.S.* v. *Normile,* 587 F.2d 784 (C.A. 5, 1979) the Court affirmed an I.R.S. conviction under 26 U.S.C. §7201 . . . and while so doing offered:

> "We have recently reviewed the prerequisites for circumstantial proof of tax evasion in *United States* v. *Boulet,* 5 Cir. 1978, 577 F.2d 1165, and it would be supererogatory to repeat what we said there. Among other duties, the government is required to conduct a full and adequate investigation in order to establish with reasonable certainty *the amount of cash the taxpayer had in his possession at the start of the taxable period* and the *opening balance in his bank accounts."* (587 F.2d at 785) (Emphasis ours)

In *United States* v. *Boulet*, 577 F.2d at 1168 (5th Cir., 1978) the Court offered the following:

> "There is always the possibility that the taxpayer deposited cash that he received from a non-taxable source or from income taxes in a prior year but kept on hand as cash or even from unreported income from a prior year kept on hand in cash. *Such events are common human occurrences, and this possibility may of itself create reasonable doubt. Therefore, the government must establish in some fashion the amount of cash the taxpayer had on hand at the start of the period. This is part of the government's duty to negate* the possibility that bank *deposits* or *cash expenditures* in the year under *investigation originated from non-taxable sources. United States* v. *Penosi, supra,* 452 F.2d at 219-220. See *United States* v. *Bianco,* 2nd Cir., 1976, 354 F.2d 501, 507, cert. denied, 1976, 429 U.S. 822, 97 S.Ct. 73, 50 L.Ed.2d 84, *suggesting that, in a cash expenditure case, proof of a likely taxable source does not suffice to relieve the prosecution of its duty to negate probable sources of non-taxable income.* Compare *United States* v. *Massei*, 1958, 355 U.S. 595, 78 S.Ct. 495, 2 L.Ed.2d 517 (net worth method)" (577 F.2d at 1168).[16] (Emphasis ours)

To alleviate any insecurity whatsoever that might exist as to the necessity by the government of proving up a net worth position at the beginning of the tax year under con-

[16] In *Taglianetti* v. *U.S.*, 398 F.2d 558 (C.A. 1, 1968), the Court of Appeals for the First Circuit, while affirming an I.R.S. conviction, approved the Fifth Circuit necessity for proving up an opening net worth in a cash expenditures case . . . 398 F.2d at 565, n.7.

Thus, the Courts of Appeals for the First, Second and Fifth Circuits each require proof of an opening net worth statement by the government where the cash expenditure method of proof is utilized under cases arising under 26 U.S.C. §7201. As this case demonstrates, the Court of Appeals for the Seventh Circuit takes a contrary view.

sideration . . . we suggest that *U.S.* v. *Gay*, 567 F.2d 1206 (C.A. 2, 1978), is dispositive in our favor. In *Gay,* the Court affirmed a conviction under 26 U.S.C. §7201 . . . but urged the following:

> "Under the expenditures method the government establishes as unreported income the amount of the taxpayer's expenditures during the taxable year that are not attributable to resources on hand at the beginning of the year, non-taxable sources received during the year, or amounts reported by the taxpayer as income during the year. *The reliability of the method depends on a reasonably accurate identification of the taxpayer's net worth position in terms of assets held at the beginning and end of the taxable year. Holland* v. *United States,* 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954); *United States* v. *Penosi,* 452 F.2d 217 (5th Cir. 1971), *cert. denied,* 405 U.S. 1065, 92 S.Ct. 1495, 31 L.Ed.2d 795 (1972). *Otherwise the expenditures might be attributable to conversion of the taxpayer's prior accumulated capital rather than to income received during that period.* See *United States* v. *Fisher,* 518 F.2d 836 (2d Cir. 1975); *United States* v. *Bianco,* 534 F.2d 501 (2d Cir. 1976)." (567 F.2d at 1207) (Emphasis ours)

In the instant case the government offered no evidence whatsoever to contradict the testimony and exhibits offered by Marcy as regarding pre-1970 monies. The government made no effort whatsoever to investigate the financial background of the taxpayer's spouse [who cosigned the tax return in question][17] albeit the exhibits and testimony clearly demonstrated over $34,000.00 in pre-1970 monies and the petitioner demonstrated, with competent

[17] Cf., *U.S.* v. *Meriwether,* 440 F.2d 753 at 755, 757 (C.A. 5, 1971); *U.S.* v. *Hallman,* 594 F.2d 198 at 200 (C.A. 9, 1979).

evidence, at trial, that $13,000.00 in two (2) separate checks were converted to cash pre-1970.[18]

The 7th Circuit in the instant case affirmed the taxpayer's conviction finding no need to establish an opening net worth . . . even though the bulk of the government's proof related to cash expenditures for the years 1970-1973. The Court of Appeals for the 1st, 2nd and 5th Circuits . . . clearly hold that the government bears the burden of proving up same [opening net worth] where the government at all relies on the expenditure method of proof. Petitioner respectfully submits that certiorari should be granted to resolve the conflict in Circuits both on the "cash expenditure question" and on the question as to whether or not the government must investigate the taxpayer's spousal net worth where there is clear evidence of pre-existing substantial monies. In the last analysis we urge that certiorari be granted and the conviction be vacated and remanded for further proceedings.

* * * * *

2. Whether consistent with the Fifth Amendment Due Process Clause and this Court's decision in *Fitzpatrick* v. *U.S.*, 178 U.S. 305 (1900), may evidence [new and original] based only on an impermissibly expanded cross-examination be used by the trial court on the question of innocence or guilt? Does this Court's decision in *Fitzpatrick* directly conflict with Rule 611, Fed.R.Evid. (1977)?

Marcy, testifying on his own behalf, denied receiving any monies from Adams in 1969 or at any other time (Tr. 738-739; Group App. B, *infra*). Over strenuous defense objec-

[18] Tr. 488-489. Indeed, the government agreed that the checks were converted to cash pre-1970 and they were unable to trace the monies thereafter (Tr. 383-85; 419-21).

tion the government's cross-examination covered an additional 90 or more pages (e.g., 750-780; 816-818; 867-872). During this *expanded* examination the steel box which contained the pre-1970 cash hoard was actually introduced into evidence . . . as was THE TRIAL COURT's REQUEST FOR THE PRODUCTION OF MONIES TAKEN FROM THE CASH BOX DURING THIS TRIAL (Tr. 792-96). The thrust of the position we take is that the Fed.R.Evid. and particularly Rule 611 do not allow for the probing into new or different matters . . . matters expressly not covered on the direct examination of the witness-defendant. While the scope of cross-examination is customarily left to the discretion of the trial court[19] it is not now [since the adopting of the Fed.R.Evid.] and it never has been . . . the law that the Court may consider, on the question of guilt or innocence, evidence brought out during a cross-examination . . . made impermissible by its unwarranted scope. For example in *Fitzpatrick* v. *U.S.*, 178 U.S. 304 (1900), the Court while affirming a homicide conviction reviewed the permissible scope of the cross-examination of a defendant-witness as follows:

> "If the prosecution should go farther and compel the defendant, on cross-examination, to write his own name or that of another person, when he had not testified in reference thereto in his direct examination, the case of *State* v. *Lurch*, 12 Or. 99, 6 Pac. 408, is authority for saying that this would be error. *It would be a clear case of the defendant being compelled to furnish original evidence against himself. State* v. *Saunders*, 14 Or. 300, 12 Pac. 441, *is also authority for the proposition that he cannot be compelled to answer as to any facts not relevant to his direct examination.*" (178 U.S. ....., 20 S.Ct. at 949) (Emphasis ours)

[19] *Geders* v. *U.S.*, 425 U.S. 80 at 87 (1976); *U.S.* v. *Nobles*, 422 U.S. 225 at 231 (1975).

Thus, it is clear, . . . that new matters may not be gone into . . . or particularly made an ingredient in the ultimate verdict of either the court or jury.[20] In *Brown* v. *U.S.*, 356 U.S. 148 (1958), the Court affirmed a criminal contempt conviction where *Brown* invoked a testimonial privilege after testifying on direct examination. The Court discussed the proper scope of cross-examination as follows:

> "Our problem is illumined by the situation of a defendant in a criminal case. If he takes the stand and testifies in his own defense his credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination." (356 U.S. at 154-155)

We note that the authorities for the above proposition are *Fitzpatrick, ante,* and *Reagan* v. *U.S.*, 157 U.S. 301, 15 S.Ct. 610 (1895). In *Reagan* the Court affirmed a cattle rustling conviction . . . but on the subject of the scope of cross examination of a defendant-witness the court offered this guidance:

> "On the other hand, if he avail himself of this privilege, his credibility may be impeached, his testimony may be assailed, and is to be weighed as that of any other witness. Assuming the position of a witness, he

20 To clarify! On the last trial day the petitioner was subjected to the expanded cross examination. Neither his "steel box" nor its contents were at all the subject of inquiry on direct examination (Group App. B, *infra*). Notwithstanding, the steel box itself was brought into evidence and its 1978 contents were reviewed by the trial court. Keeping the matter in context we find that the trial judge, in 1978, is looking at monies . . . during trial . . . from the defendant's "cash hoard" where the indictment alleges income tax evasion from the year 1970. Such a practice can only be described as a substantial abuse of discretion totally *unauthorized* by Rule 611.

> is entitled to all its rights and protections, and is subject to all its criticisms and burdens. *It is unnecessary to consider whether, when offering himself as a witness as to one matter, he may, either, at the will of the government or under the discretion of the court, be called upon to testify as to other matters. That question is not involved in this case, and we notice it simply to exclude it from the scope of our observations."* (157 U.S. at ....., 15 S.Ct. at 611) (Emphasis ours)

In *Lis* v. *Robert Packer Hospital,* 579 F.2d 819 (C.A. 2, 1978), the Court affirmed a medical malpractice case while discussing the Federal Rule of Evidence 611(a), (b). The Court, while finding no prejudicial error UNDER THE PECULIAR FACTS OF THAT CIVIL TRIAL, reviewed the committee comments to 611 and as to 611 stated:

> "Clearly then, the Rule in its present form establishes a predictable[21] and orderly procedure for the presentation of the various sides to a dispute. The first sentence of the Rule declared that "[c]ross examination should be limited to the subject matter of the direct examination". The second sentence, affording courts the power to expand the inquiry, clearly contemplates special circumstances.
>
> "We agree with appellants that, notwithstanding the trial court's laudable motives, its ruling effectuated neither the letter nor the spirit of Rule 611(b). Simply stated, the Rule does not confer upon a fed-

21 We are reminded of Oliver Wendell Holmes' well-known phrase that "[t]he prophecies of what the courts will do in fact, and nothing more, is what I mean by the law." Holmes, *The Path of the Law*, 10 Harv.L.Rev. 457, 460-61 (1897). Holmes, of course, was referring generally to areas of law broader than those relating to the conduct of trials, but the import of his statement remains: the most meaningful system will be one which is sufficiently predictable that lawyers and litigants might make informed decisions as to trial strategy.

eral judge 'the right to permit inquiry beyond the scope of the direct . . . in every case'. Rather, the general prescription is precisely the opposite. Any right to counter the stated procedure is granted to the trial court only 'in the exercise of discretion'. To follow the practice announced by the trial judge in this case is not to exercise discretion; it is to use no discretion whatever." (579 F.2d at 822-23) (n. 5, reproduced as our n. 21)

We respectfully take the view that in a federal criminal case the scope of cross-examination [particularly the defendants] should not be something that either the defendant or his attorney must guess at. It is not without respect that we understand the rule to relate to the "discretion" of the trial judge. However, to follow the practice in the case at bar . . . would be to expose a defendant in a federal criminal case to the possibility of being convicted based upon the production of evidence which had absolutely nothing to do with EITHER HIS DIRECT EXAMINATION OR EVEN THE SUBJECT MATTER OF THE INDICTMENT FOR WHICH HE WAS STANDING TRIAL. Based on all the peculiar facts of this case it is respectfully submitted that the trial court abused his discretion in allowing the government an unlimited "scope" of cross examination and, further, that the trial court committed prejudicial error in requesting the production of the steel box [and its recent contents][22] . . . when the direct examination of the defendant was nothing more than a

22 The government's brief in the Appellate Court suggested that the lack of objections for both the steel box and its contents were, in effect, a waiver (Gov. Brf. pp. 32-33). In that this was a bench trial it is not difficult to understand the defendant's reluctance to object to the production of same.

denial . . . of receiving $55,000.00 from a government witness 8 years earlier.

> "to follow the practice announced by the trial judge in this case is not to exercise discretion; it is to use no discretion whatsoever" (*Lis, ante,* 579 F.2d at 823 (C.A. 2, 1978)).

CONCLUSION

As to Questions 1 and 1(a), we respectfully suggest that the split in Circuits on the question of whether the government must offer, with reasonable certainty, any "opening net worth" in an I.R.S. prosecution utilizing, even in part, the "cash expenditure" is a substantial reason for granting certiorari. In addition the Fifth and Ninth Circuits seemingly compel the government to offer proof of spousal net worth in a case such as this . . . while the Seventh Circuit by virtue of this decision, makes no such requirement. Petitioner respectfully points out that current research has disclosed no decision where the government was not required to offer some evidence of opening net worth . . . where the taxpayer clearly demonstrated substantial existing pre-tax year monies . . . and where the government made absolutely no investigation for any pre-tax years.

As to Question 2 it is respectfully submitted that the trial court totally abused its discretion in allowing the government to inquire substantially beyond the scope of direct examination and further, the trial judge committed prejudicial error in requesting that the defendant-taxpayer produce present monies from a cash hoard where

the offense for which he was standing trial . . . occurred 8 years earlier. For these reasons it is respectfully urged that certiorari be granted and the conviction and sentence be vacated with directions that the petitioner be tried anew.

Respectfully submitted,

ALLAN A. ACKERMAN
100 N. LaSalle Street
Suite 611
Chicago, Illinois 60602
(312) 332-2863
Attorney for Petitioner

RAYMOND J. SMITH
53 W. Jackson Boulevard
Suite 615
Chicago, Illinois 60604
(312) 922-8980
Of Counsel

APPENDICES

APPENDIX A
Opinion below

GROUP APPENDIX B
Direct trial testimony of Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

(ARGUED JUNE 15, 1979)
JULY 9, 1979.

Before
Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 78-2616 vs.

PAUL MARCY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 77-Cr-361 — STANLEY J. ROSZKOWSKI, *Judge.*

ORDER

[Unpublished Order Not To Be Cited Per Circuit Rule 35]

Appellant's conviction of filing a false income tax return for the 1970 calendar year must be AFFIRMED.

The government offered testimony of a specific payment of $55,000 income to appellant during the year in question. It was not reported. The government also proved that appellant made substantial expenditures at later dates. The government does not claim that the latter proof was sufficient, standing alone, but that it corroborated receipt of the specific item of cash income. Appellant claimed the cash had become available from other and earlier sources, a claim the judge found incredible. In briefs appellant

seemed to argue that in connection with the proof of cash expenditures, the government was required to prove an "opening net worth" as if the government were relying on a net worth theory.

At oral argument appellant took a somewhat different tack. He claimed that in a memorandum opinion the district judge indicated less than a full belief in the "specific item case" and in the veracity of government witness Adams who allegedly paid defendant the money. We do not read the opinion as saying that. While the memorandum opinion does not explicitly state that the trial judge believed witness Adams' testimony, it does state that "a thorough consideration of the evidence presented can lead to no other conclusion except that the government has proved its case beyond a reasonable doubt." Further motions of appellant were denied. Implicit in the trial court's conclusion is the reasoning that Marcy would not have been found guilty beyond a reasonable doubt had not the judge found Adams' testimony believable. The trial judge scrutinized evidence presented by the government and defendant and concluded that the cash hoard defense was so replete with inconsistencies as to render it unbelievable. We find no basis for determining that the judge rejected the proof of the $55,000 payment, and found guilt on a net worth theory.

The trial court did not abuse its discretion by permitting cross-examination of defendant Marcy about facts directly relating to his credibility. The government's case was based on Adams' testimony that he paid a $55,000 payoff to Marcy in January, 1970. Marcy denied receipt of the money. Thus, questions regarding Marcy's spending habits after 1970 were relevant to his credibility.

Defendant's claim that his Sixth Amendment right to effective assistance of counsel was violated by trial court's admonition to defendant not to discuss his testimony with anyone during a ten-minute recess is equally without merit. Defendant Marcy's counsel did not object to the prohibition. From the absence of objection it is possible to infer that he also understood the restriction as applying only to contacts with other witnesses.

The judgment appealed from is AFFIRMED.

GROUP APPENDIX B

737 PAUL MARCY,

defendant herein, called as a witness on his own behalf and having been first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. SMITH:

Q. Will you state your full name and spell your last name?

A. My name is Paul Marcy, M-a-r-c-y.

Q. Mr. Marcy, directing your attention to the year 1969—the years 1969 and 1970, how many—excuse me, Mr. Coughlin—how many telephone lines did you have at your office at the Zoning Board of Appeals office?

A. We had four lines.

Q. And what were those numbers?

A. 443-7681, '82, '83, and '84.

Q. And if a call were to come on the first line and the line was busy, would it be transferred over to the next call?

A. Yes, sir.

Q. And so on for the third and fourth?

A. Fourth, yes.

Q. Do you still have four lines in your office?

A. Yes, we do.

Q. Showing you what has been marked Defendant's
738 Exhibit Z for identification, could you tell me what that is a picture of?

A. This is a picture of my office and my desk.

Q. Now, this is a picture taken fairly recently, is that correct?

A. That's correct.

Q. Is this the same desk depicted in your—that you had in the year 196—the years 1969 and 1970?

A. Yes, it is.

Q. Does that have a center drawer to it?

A. It does not.

MR. SMITH: Your Honor, I would move Defendant's Exhibit Z into evidence.

THE COURT: Any objection?

MR. PARENTI: Your Honor, may I know when the photograph was taken?

BY MR. SMITH:

Q. Do you know when it was taken, Mr. Marcy?

A. Approximately a week ago.

Q. These photographs of the office and the desk?

A. That is correct.

THE COURT: Any objection?

MR. SMITH: Any objection?

MR. PARENTI: I have no objection.

THE COURT: It may be admitted.

(Said exhibit so offered and received was marked Defendant's Exhibit Z.)

739 BY MR. SMITH:

Q. Mr. Marcy, in 1969 and 1970, or at any time, did you receive $55,000 or any amounts of monies from William Adams?

A. No.

MR. SMITH: Your witness.